Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Syndicat des travailleuses et travailleurs de Transport F. Lussier - CSN,

applicant,

and

Transport F. Lussier Inc.,

employer,

and

United Food and Commercial Workers, Local 501,

certified bargaining agent.

Board File: 29724-C
Neutral Citation: 2013 CIRB 678
March 21, 2013

The Canada Industrial Relations Board (the Board) was composed of Mr. Claude Roy, Vice-Chairperson, and Messrs. Daniel Charbonneau and Robert Monette, Members.

Parties' Representatives of Record

Mr. Yves Larrivée, for the Syndicat des travailleuses et travailleurs de Transport F. Lussier - CSN;

Mr. Philippe-André Tessier, for Transport F. Lussier Inc.;

Ms. Sibel Ataogul, for United Food and Commercial Workers, Local 501.

The **majority** reasons for decision were written by Mr. Claude Roy, Vice-Chairperson. The **dissenting opinion** was written by Mr. Daniel Charbonneau, Member.

[1] Section 16.1 of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this complaint without an oral hearing.

Nature of the Application

[2] On December 3, 2012, the applicant filed an application for certification pursuant to section 24(1) of the *Code* to represent the following:

> All employees of Transport F. Lussier Inc., **excluding** office clerks, mechanics, owner-operators and members of the principal owner's immediate family.

Background and Facts

[3] The employees of Transport F. Lussier Inc. (the employer) covered by that application for certification are already represented by the United Food and Commercial Workers, Local 501 (the bargaining agent), under a certification order (no. 9679-U) issued by the Board on July 28, 2009.

[4] The employees concerned are covered by a collective agreement in effect from April 13, 2010, to February 28, 2013. The application for certification was filed in a raid situation within the time limits set out in the *Code*.

[5] The applicant has a very strong representative character and the evidence of union membership is consistent with the requirements of the *Canada Industrial Relations Board Regulations, 2001* (the 2001 *Regulations*), which were in effect at the time the application for certification was filed in the instant matter. In addition, on December 3, 2012, the applicant served the bargaining agent with member resignations in a number equal to the number of membership cards filed as evidence of union membership. The employer posted the notice of the application as provided for under section 11 of the 2001 *Regulations*.

[6] On December 12, 2012, counsel for the bargaining agent responded to the application for certification, indicating that her client

> ... has serious doubts as to the wish of the employees to be represented by it. In fact, our client was informed that the resignations had been signed on the work premises during working hours.
>
> (translation)

[7] On December 21, 2012, counsel for the applicant who was responsible for the case at the time responded to the allegations of the bargaining agent, stating the following:

> We not only deny such an allegation, but also submit that the "serious doubts" are nothing more than vague, unfounded allegations without any basis in specific fact. In fact, the bargaining agent has provided no concrete evidence that employees resigned their membership on the work premises during working hours. We submit to the Board that such an allegation cannot serve as a genuine ground for challenging the application for certification.
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> Furthermore, the representative of the UFCW, Local 501 cannot disregard the fact that, on December 3, the applicant union served it with a large number of resignations, which can leave the Board in no doubt as to the wishes of the employees to cease being represented by the UFCW, Local 501, and consequently to be represented by the Syndicat des travailleuses et travailleurs de Transport F. Lussier - CSN.
>
> The applicant union has overwhelming majority support and we submit that this is a situation where the Board should accept the membership cards and resignations as the final expression of the employees' wishes.
>
> (translation)

[8] That same day, counsel for the bargaining agent replied to the response of counsel for the applicant, as follows:

> ...We wish to point out that, according to the information obtained by the Union, the cards were signed during working hours when the employees were making deliveries to the employer's clients.
>
> We submit that, given the existence of an active certified bargaining agent and the circumstances of the campaign, it is important that a vote be held in this case...
>
> (translation)

[9] Those are the facts and the parties' arguments in this matter. The Board must now determine whether a representation vote should be ordered since the application for certification was filed in a raid situation or whether the applicant should be certified as the bargaining agent for the unit sought.

Analysis and Decision

A–Applicable Law

1–The *Code*

[10] To determine whether or not a representation vote should be held in the instant matter, the Board deems it is useful to refer to the relevant sections of the *Code* and the *Canada Industrial Relations Board Regulations, 2012* (the *Regulations*), in order to properly understand its finding.

[11] Section 3(1) of the *Code* defines the term "bargaining agent" as follows:

> 3.(1) In this part,
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> ...
>
> "bargaining agent" means
>
> (a) a trade union that has been certified by the Board as the bargaining agent for the employees in a bargaining unit and the certification of which has not been revoked, or
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> (b) any other trade union that has entered into a collective agreement on behalf of the employees in a bargaining unit
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> (i) the term of which has not expired, or
>
> (ii) in respect of which the trade union has, by notice given pursuant to subsection 49(1), required the employer to commence collective bargaining.

[12] In regard to the date as of which the Board must determine the wishes of the employees, section 17 of the *Code* provides as follows:

> 17. Where the Board is required, in connection with any application made under this Part, to determine the wishes of the majority of the employees in a unit, it shall determine those wishes as of the date of the filing of the application or as of such other date as the Board considers appropriate.

[13] The rules respecting certification are set out in section 28 of the *Code*, as follows:

> 28. Where the Board
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> (*a*) has received from a trade union an application for certification as the bargaining agent for a unit,
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> (*b*) has determined the unit that constitutes a unit appropriate for collective bargaining, and;
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> (*c*) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,
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> the Board **shall**, subject to this Part, **certify** the trade union making the application as the bargaining agent for the bargaining unit.
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> (emphasis added)

[14] With regard to the need for a representation vote, the Board enjoys discretion under section 29(1) of the *Code*:

> 29.(1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit.

[15] Finally, with regard to evidence of the wishes of the employees, the Board has adopted sections 30 and 31(1) of the *Regulations*, which provide as follows:

> 30. In any application relating to the certification of a bargaining agent
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> (*a*) the membership of an employee in a trade union is evidence that the employee wishes to be represented by the trade union as that employee's bargaining agent; and
>
> (*b*) the membership in a trade union of a majority of employees in a unit appropriate for collective bargaining is evidence that the majority of the employees in the bargaining unit wish to be represented by the trade union as their bargaining agent.
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> 31.(1) In any application relating to bargaining rights, the Board may accept as evidence of membership in a trade union evidence that a person
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> (*a*) has signed an application for membership in the trade union; and
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> (*b*) has paid at least five dollars to the trade union for or within the six-month period immediately before the date on which the application was filed.

2–Board's Interpretation of the Relevant Provisions

[16] The Board has long had to interpret these provisions respecting applications for certification in raid situations. The principles underpinning the Board's decision in this matter are set out in the Board's case law.

[17] In *Aéroports de Montréal* (1993), 93 di 33; 21 CLRBR (2d) 289; and 94 CLLC 16,029 (CLRB no. 1038), issued on November 18, 1993, the Board's predecessor, the Canada Labour Relations Board (the CLRB), found that a representation vote will not be ordered in a raid situation if the applicant union can demonstrate that it has the necessary majority support when it files its application and that a majority of the employees in the bargaining unit have resigned their membership in the incumbent union. The CLRB stated the following:

> **The Unions' Representative Character**
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> Where a union wishes to replace a certified bargaining agent, it must demonstrate to the Board that, on the date on which it files its application, it has the support of a majority of employees, that is, of more than 50% of the group represented by the certified bargaining agent. The Board established this rule and consistently applied it. (See *CJMS Radio Montréal (Québec) Limitée* (1978), 33 di 393; and

[1980] 1 Can LRBR 270 (CLRB no. 151); and *Canadian Pacific Express and Transport* (1988), 73 di 183 (CLRB no. 682).)

Moreover, the Board orders, as a rule, a representation vote to choose between the applicant union and the certified bargaining agent if it is satisfied that the two unions represent, on the date of the application, a majority of employees. This rule does not apply if the certified bargaining agent has lost its representative character, in particular following the resignation of a sufficient number of its members. The Board can then certify the applicant union without holding a representation vote. (See *Maple Leaf Mills Limited* (1978), 23 di 114 (CLRB) no. 128); and *Bell Canada* (1979), 30 di 112; and [1979] 2 Can LRBR 435 (CLRB no. 192).)

In this case, the Syndicat established that it possessed, on May 12, 1993, the required representative character and that a sufficient number of employees in the bargaining unit had withdrawn their support from PSAC as of that date. The Syndicat produced resignations to this effect in support of its application for certification.

(pages 50; 305–306; and 14,233–14,234)

[18] In *Atomic Transportation System Inc.* (1994), 94 di 48 (CLRB no. 1064), issued on May 16, 1994, the CLRB stated the following:

Since then, in exercising its discretion under section 29(1), the Board has maintained that it would order representation votes only in special circumstances such as particular raid applications, alleged unfair labour practices, where it suspects that union membership evidence is tainted or irregular, and, very exceptionally, where a considerable amount of time has passed between the date of application and the date of the Board's decision (*Murray Bay Marine Terminal Inc.* (1983), 50 di 163 (CLRB no. 401), at pages 168-169; see also *Sedpex Inc., supra* at pages 112-123).

Only very rarely has the Board departed from such policy and determined that employee wishes ought to be ascertained at another date and through another means than membership evidence. In these cases, the Board, depending on the nature of the irregularities alleged or affecting the membership evidence, has either ordered a representation vote in accordance with section 29(1) of the *Code* or dismissed the certification application outright.

For example, in *Quebecair* (1978), 33 di 480; and [1979] 3 Can LRBR 550 (CLRB no. 163), a representation vote was ordered, since factors such as the exclusions, the organizational changes in the company, the high turnover in the unit, and the unascertainable changes in the unit membership, made it difficult to determine employee wishes at the date of the hearing on the basis of information submitted at the time of the application.

(page 55)

[19] In a decision issued on August 1, 1995, in *Télébec Ltée* (1995), 99 di 1 (CLRB no. 1133) (*Télébec 1133*), the CLRB also found as follows, ordering a representation vote to be held:

This is the reason why the Board, after reviewing the file, the evidence and the provisions of the *Code* and *Regulations* dealing with representative character, decided that it is not satisfied, as it must be under section 28(*c*) of the *Code*, that, as of the date of the filing of the certification applications, a majority of employees in either unit deemed appropriate wished to be represented by one of the unions. In fact, the Board cannot ascertain, on the basis of membership cards or other relevant evidence, that a majority of employees expressed their wishes in this case. In this regard, the file reveals that some employees changed union allegiance more than once during the period prior to the filing of the first applications in June 1994 and since the hearings ended in March 1995.

> The Board has therefore decided to exercise the discretion conferred by section 29(1) of the *Code* and order a representation vote for each of the two units deemed appropriate for collective bargaining. This provision reads as follows:
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> "29.(1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit."
>
> ...
>
> The general rule has been well established in Board decisions, namely that membership cards produced in virtue of sections 23 and 24 of the Regulations are used by the Board to satisfy itself, as of the date the certification application is filed, of majority support for a union in accordance with section 28(*c*) of the *Code*. Consequently, the Board only orders a vote pursuant to section 29(1) where special or unusual circumstances warrant it. It has thus considered cases involving raiding, allegations of unfair labour practices disputing union membership evidence, or a long delay between the date of the certification application and the date of the Board's decision, as situations warranting a representation vote. (With respect to the Board's general approach regarding this matter, see *CJMS Radio Montréal (Québec) Limitée, supra*; and *Murray Bay Marine Terminal Inc.* (1983), 50 di 163 (CLRB no. 401).)
>
> (pages 19–20)

[20] In *Canadian National Railway Company*, 2004 CIRB 282, issued on July 30, 2004, the Board set out the criteria on which it relies to assess membership in a union, stating the following:

> [11] Section 28(*c*) of the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*) gives the Board the discretion to set the date at which to evaluate the union's support. This is a question of law and not subject to review by the Federal Court of Appeal (see *Maritime-Ontario Freight Lines Ltd.* v. *CLRB et al.* (1988), 88 CLLC 14,009). Consistent with the wording of the legislation, the Board has consistently applied a policy of ascertaining a union's support by its membership as of the date of the filing of the application (see *Rogers Cablesystems Limited*, [1999] CIRB no. 32; and 2000 CLLC 220-017.
>
> [12] The principal reason for this policy is to avoid giving the employer the opportunity to interfere with employees' freedom to select a bargaining agent. The application date as the standard allows for some finality in all but the most unusual circumstances, and therefore sets down the policy for considering revocations of membership. In *Provincial Bank of Canada, Roberval* (1978), 34 di 633 (CLRB no. 171), the Board held that the wishes of employees, including resignations, are assessed as of the date of application for certification.
>
> [13] Neither union has argued that this policy should not apply to the circumstances of this case. Accordingly, where employees signed membership cards, resignations of membership prior to the date of application that have been communicated to the union have the effect of reducing majority support. Any revocation after the date of application is of no effect in reducing a union's support. Therefore, membership cards are to be counted on this basis.

[21] In that same matter, the Board stated the following regarding the determination of the representative character of the union:

> [29] There are two steps to ascertaining employee wishes. The first is to determine the unit that, in the Board's opinion, is appropriate for collective bargaining pursuant to section 27(1) of the *Code*. The

second is for the Board to satisfy itself that a majority of employees in the defined unit wish to have a particular bargaining agent represent them.

[30] Because of the requirement to sign membership cards as part of the certification process, it has been the Board's long-standing practice and policy to consider membership cards as the best evidence of employee wishes and exercise its discretion in ordering a vote in only the most compelling circumstances. This practice was reviewed in *Patterson Enterprises Ltd.* (1994), 93 di 154 (CLRB no. 1049).

[31] The Board is not swayed by the filing of employee petitions, letters or revocations of membership in its decision whether to order a vote. Signatories of union membership cards bear the responsibility of their decision to join a union. Unless there are genuine reasons to disregard valid membership evidence, the Board is justified in relying on it (see *Canadian Broadcasting Corporation* (1993), 91 di 191 (CLRB no. 1007); and *Patterson Enterprises Ltd., supra*).

[32] By relying on signed membership cards at the time of the application for certification to ascertain employee wishes, the Board has an assurance that there has been no taint of employer involvement. In *Delta Bus Ltd.* (1992), 88 di 7 (CLRB no. 932), affirmed *Thorburn et al.* v. *General Truck Drivers and Helpers, Local Union No. 31 et al.*, judgment rendered from the bench, no. A-1127-92, April 20, 1994 (F.C.A.), the Board refused to consider employees' change of heart after the application for certification had been filed.

[33] Except in unusual circumstances, wishes not to be represented by a union or requests for a representation vote do not cast a doubt on the validity of membership evidence. The Board will always prefer the wish of the majority of the employees, as expressed by the signing of membership cards, which is the method of expression set forth in the Board's *Canada Industrial Relations Board Regulation, 2001* (*Regulations*) (see section 31).

[34] When the validity of membership evidence is contested, it is the Board's practice to investigate such allegations through confidential interviews conducted by the Board's investigating officer. Any irregularities are reported to the panel of the Board, as is all evidence of employee wishes as to union membership. It is then up to the Board to evaluate whether or not these allegations merit further review.

[35] A further reason for the Board's reluctance to order a vote is because the campaign leading to a vote is usually very divisive and does little to foster relations between a union and its membership. In fact, the tension created in the workplace most often has a negative impact on the union-employer relationship, which takes many years to heal.

[22] In *Consolidated Fastfrate Inc.*, 2005 CIRB 312 (*Fastfrate 312*), issued on March 2, 2005, which refers to *Télébec Ltée* (1995), 99 di 141; and 96 CLLC 220-040 (CLRB no. 1148) (*Télébec 1148*), issued on reconsideration of the above decision, the Board stated the following in regard to the rules to be applied for determining the representative character of a union in a raid situation:

[54] The consequence of this characterization is that the membership support rule for raid situations is applicable. This rule requires that the applicant union demonstrate that it has majority support of the proposed unit at the date the application is filed. Further, a representation vote may be ordered to ensure that the "raiding" union does in fact enjoy the requisite level of support of all employees in the proposed unit.

[55] In *Télébec Ltée* (1995), 99 di 141; and 96 CLLC 220-040 (CLRB no. 1148), a reconsideration decision, the Board characterized the applicant union's certification application as being in the nature of a raid and described the Board's approach as follows:

"This characterization stemmed from the fact that the CNTU was seeking to represent, in a single bargaining unit, office employees from a number of bargaining units who were represented for years by various bargaining agents. Although the certification application sought to redefine the bargaining structure for the office employees, it was not a first attempt at unionizing these employees, or at acquiring for them the right to bargain collectively. Its main purpose was to oust the incumbent bargaining agents. In this sense, CNTU's application corresponds to the notion of raiding which the Board has adopted and has applied until now.

Over the years, the Board developed principles governing membership support in the case of raid situations. The first decisions dealing with this question held that the unit sought must be identical to the existing unit and that the union seeking to oust another union must have the support of more than 50% of the employees in the unit when it files its certification application. If the incumbent bargaining agent still represents a majority of employees, the Board orders a representation vote under section 29(1) to satisfy itself, in accordance with section 28(*c*), that a majority of employees wants to be represented by one of the unions. **However, if the Board is satisfied that the raiding union has the required majority, it can certify it without a representation vote.**

...

So far, the Board has followed this approach in all raid situations, including *Télé-Métropole Inc.* (1992), 88 di 205 (CLRB no. 951); and *VIA Rail Canada Inc.* (1993), 92 di 90 (CLRB no. 1022). In both cases, the Board reaffirmed that a union seeking to oust one or more other unions must have the support of more than 50% of the employees in the unit sought.

(pages 145–148; and 143,387–143,390; emphasis added)"

[56] While the Board typically orders a representation vote in circumstances of raid applications, such a vote would be ordered pursuant to section 29(1) of the *Code*, and is not mandatory. As noted in *Télébec Ltée*, *supra*, if the Board is otherwise satisfied that the applicant "raiding" union has the required majority support, it may certify without holding a vote (see also *Bell Canada* (1979), 30 di 112; and [1979] 2 Can LRBR 435 (CLRB no. 192); and *Loomis Armored Car Service Ltd.*, *supra*).

[23] In *Consolidated Fastfrate Inc.*, 2005 CIRB 333 (*Fastfrate 333*), issued on reconsideration on September 14, 2005, the Board stated that while the Board's policy is to order a representation vote in a raid situation, an exception applies where support for the raiding union that filed the certification application is so overwhelming that the raided bargaining agent has little chance of winning in a representation vote. It stated the following in this regard:

[39] The employer is correct in stating that the Board's general policy is that a representation vote will be held where a certification application is in the nature of a raid. In *Tank Truck Transport Inc.et al.*, [1999] CIRB no. 27, the Board stated, however, that there is an exception to this practice where the raided bargaining agent does not oppose the raid application. Moreover, there is also another exception, that is, where support for the raiding union is so overwhelming that the raided union has little chance of obtaining support were a representation vote held.

[40] In this case, the individual Teamsters locals represented four of the five bargaining units. Their numbers corresponded to considerably more than half the number of employees in the bargaining unit. While the Association may have opposed the application, the fact remains that once their members are incorporated into the bargaining unit, even if all of them were to vote against being represented by the WCCT, they could not reasonably hope to defeat a vote involving the WCCT. Therefore, there would be no labour relations purpose to ordering a vote, other than to provide members of the Association with an opportunity to express their discontent. Furthermore, the certification process under the *Code* and its *Regulations* is card-based as opposed to a vote-based system as exists in most provinces. That means that where the bargaining agent produces signed membership cards and the Board is satisfied

> that these cards represent the wishes of the majority of employees, the Board will certify without conducting a vote.
>
> [41] Consequently, while the Board's practice is to order a representation vote in the case of a raid, it was entirely within the discretion of the original panel not to order a vote where such a vote did not have a valid labour relations purpose under the *Code*. Therefore, the employer's argument on this point is dismissed.

B–Decision

[24] It is in the light of the above rules of law and principles drawn from case law that the Board makes its decision in this matter.

[25] Pursuant to section 17 of the *Code*, the Board determines the wishes of the majority of the employees in a bargaining unit as of the date of filing of the application for certification. However, the Board has discretion to ascertain employee wishes as of any date that it considers appropriate. It typically exercises that discretion when there are special circumstances such as when the disposition of an application for certification is considerably drawn out because of hearings spread over several months, applications for reconsideration, judicial reviews, significant shifts among the employees concerned during the period of determination of the unit appropriate for collective bargaining, or some difficulty in determining such unit.

[26] In the application for certification in the instant matter, the Board has not noted any facts or special circumstances that would lead it to exercise its discretion to choose a different date from December 3, 2012, as the date for determining the wishes of the majority of employees in the bargaining unit concerned.

[27] Under section 28 of the *Code*, the Board **shall certify** the union making the application as the bargaining agent for the bargaining unit when the conditions set out therein are met. Under section 28(*a*), the Board must ascertain that the application is an application for certification, which is the case in the instant matter. Under section 28(*b*), it must have determined the unit that constitutes a unit appropriate for collective bargaining. Since in the instant matter the unit concerned is the same unit recognized by the Board in certification order no. 9679-U of July 28, 2009, this condition is also met, and no doubts were raised in this regard.

[28] Finally, under section 28(*c*) of the *Code*, the Board must be satisfied that, as of the date of the filing of the application or of such other date as it considers appropriate, a majority of the

employees in the unit covered by the application wished to have the applicant represent them as their bargaining agent.

[29] The Board has established that it is as of the date of filing of the application that it must determine the wishes of the majority of the employees concerned, as there are no other circumstances that would lead it to choose a different date. Section 30 of the *Regulations* governs the Board in its determination of the wishes of the majority of employees. The Board considers the membership of an employee in the applicant union to be evidence that the employee wishes to be represented by the applicant as his or her bargaining agent and that the membership of a majority of the employees is evidence that the majority wishes to be represented by the applicant. Under section 31 of the *Regulations*, the Board may accept as evidence of membership in a trade union evidence that a person has signed an application for membership in the trade union and has paid at least five dollars to the trade union for or within the six-month period immediately before the date on which the certification application was filed.

[30] The Board notes that, on December 3, 2012, the date of filing of the application for certification, the wish of the majority of employees was to be represented by the applicant and that wish was very clearly expressed in the recognized membership cards filed as evidence of membership. In addition, this wish of the majority was confirmed by the membership resignations served on the bargaining agent that same day, in a number equal to the number of membership cards filed as evidence of membership in the applicant union. The said resignations are one of the factors or criteria that the Board may consider, pursuant to the case law cited previously (see *Aéroports de Montréal;* and *Canadian National Railway Company, supra*). Majority support has been demonstrated and the resignations have been served.

[31] The issue that remains to be determined is whether or not a representation vote should be held, given that the application was made in a raid situation. On December 12, 2012, counsel for the bargaining agent indicated that her client had serious doubts as to the wish of the employees to be represented by the applicant, adding that her client had been informed that resignations had been signed on work premises during working hours. The applicant categorically denied the allegations on December 21, 2012, and argued that the Board had to accept the membership cards and resignations "as the final expression of the ... wishes" of the majority of the employees

without holding a representation vote. On December 21, 2012, counsel for the bargaining agent replied that what had been signed during working hours had been the membership cards, not the resignations, as she had alleged on December 12, 2012. She stressed that it was important that the Board order a representation vote given "the existence of an active certified bargaining agent and the circumstances of the campaign."

[32] The applicant denies the allegations of the bargaining agent. Further, the Board notes that those allegations are actually not based on any precise facts. The bargaining agent did not file an affidavit in support of its contentions that could have demonstrated facts, events, dates or exceptional circumstances that would have warranted the holding of a representation vote, other than the fact that the application was filed in a raid situation. The allegations are nothing more than conjecture.

[33] As a general rule, the Board determines certification applications on the basis of the material on file. The bargaining agent at risk of being displaced must support its allegations with evidence demonstrating the existence of exceptional circumstances that would lead the Board to order a representation vote. However, in the instant matter, the bargaining agent did nothing of the kind, and the Board cannot order a representation vote on the basis of conjecture.

[34] While the Board's practice is generally to order a representation vote in the case of a raid, as is indicated in the case law above, an exception is made when the Board notes that the raiding union enjoys clearly expressed majority support and a representation vote would not serve a valid labour relations purpose under the *Code* (see *Télébec 1133*; and *Consolidated Fastfrate Inc., supra*).

[35] The Board finds that there are no exceptional circumstances in the instant matter that would lead it to order a representation vote pursuant to section 29(1) of the *Code*. The only exceptional circumstance alleged by the bargaining agent is the fact of the raid. As for the rest of the allegations, the Board considers that they are mere conjecture and not based on any precise and consistent evidence. The Board notes that the applicant has majority support that has very clearly been expressed through the evidence of membership filed in support of the application for certification and through the resignations served on the bargaining agent, which is one of the exceptions to the principle noted previously.

Conclusion

[36] For all of the foregoing reasons, the Board

(1) Grants the applicant's application for certification;

(2) Declares that the applicant has met the certification requirements under the *Code* and grants it the right to act as bargaining agent for a unit of employees comprising:

all employees of Transport F. Lussier Inc., **excluding** office clerks, mechanics, owner-operators and members of the principal owner's immediate family.

(3) Declares that the applicant has acquired all the rights, privileges and duties of the predecessor bargaining agent.

[37] The parties will find enclosed the Board's certification order in both official languages.

[38] This is a decision of the majority of the Board.

Translation

Claude Roy
Vice-Chairperson

Robert Monette
Member

Dissenting opinion of Mr. Daniel Charbonneau, Member

[39] I have carefully read the reasons for decision of the majority in this matter. With due respect to my colleagues, I would not have granted this application for certification of the applicant union without first satisfying myself of the employees' wishes by means of a representation vote.

[40] In fact, the decision of the majority calls into question the established policy of the Board and its predecessor, the CLRB, to order a representation vote in cases of raids, to allow the employees concerned to express their choice between the two competing unions.

[41] In *Tank Truck Transport Inc.*, 1999 CIRB 27, the Board summarized its policy to hold a representation vote in case of raids as follows:

> [39] As expressed in *Canadian Pacific Express and Transport*, *supra*, the policy of the Board in the case of a raid is to hold a representation vote among the employees even if the raiding union, in this case the CCT, has more than 50% of membership support. However, there is an exception to this practice, when the raided bargaining agent does not oppose the raid application (see *AirBC Limited* (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797)). In such cases, the Board is prepared to accept union membership cards as a final expression of the employees wishes...

[42] Policy considerations are different depending on whether a matter involves a straightforward application for certification or an application made in a raid situation. When the Board has before it a straightforward certification application, it strives to promote freedom of association and access to collective bargaining. In such cases, membership cards are generally sufficient to ascertain the wishes of the employees covered by the application for certification, except where the union represents not less than thirty-five percent and not more than fifty percent of the employees. Where the Board has before it an application for certification in a raid situation, its role is to ensure labour relations stability while promoting the employees' freedom to belong to the union of their choice. Accordingly, the Board has developed stricter rules for ascertaining the choice of employees covered by an application for certification in a raid situation and it will typically order a representation vote in such cases if the applicant union has provided evidence of membership of the majority of the employees in the bargaining unit concerned.

[43] The reasoning behind the Board's policy pertaining to union raids is clearly explained in *Bell Canada* (1979), 30 di 112; and [1979] 2 Can LRBR 435 (CLRB no. 192):

> In summary, before it certifies a union, the Board must be satisfied that a majority of the employees wish to be represented by that union. As a general rule, the wishes of the employees are considered as of the date of the application for certification, and this is done by considering their union membership. In the case of a union which seeks to replace another, our general rule is that we order a vote to determine the wishes of the employees only if the applicant union can show that at the time when it filed its application for certification, the majority of the employees in the certified unit had joined it. As we have already stated, this course of action takes account of the fact that we must ensure the stability of labour relations, and that it is not in the interest of administering the provisions of the *Code* to promote union raids, or to promote the formation of one union to the detriment of another. Our rule with respect to the taking of votes, even when a union has a majority at the time when it files its application, takes account of the fact that the employees are torn between several unions and are subjected to a great deal of pressure. In such circumstances, we have often seen different unions display a majority support from the same employees. Experience has taught us that in cases of union raids, a vote should be ordered so that the employees may choose freely, within the privacy of the

> polling booth, which union they wish to have as their representative. However, since the focus is the wish of the employees, special circumstances may arise, as in the case of *Maple Leaf Mills Limited*, in which it may not be necessary to order a vote because the employees' wishes are so evident. As we have also stated, special circumstances may arise in which it may be necessary for us to order a vote under section 127(1) in a case where the applicant union does not have a majority when it files its application for certification.
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> (pages 117; and 439–440)

[44] In my view, the circumstances of the matter before the Board do not warrant any deviation from its established policy of ordering a representation vote in cases of raids, even if the applicant union has produced membership cards for a majority of the employees in the bargaining unit and resignations from a majority of members of the incumbent bargaining agent.

[45] In the first place, the reasoning of the majority is based primarily on *Aéroports de Montréal*, *supra*, which involved a matter in which the incumbent bargaining agent had not challenged the validity of the membership cards or resignations served by the applicant union. The bargaining agent had merely objected to the timeliness of the application for certification. In the matter now before the Board, however, the bargaining agent challenged the validity of the membership cards and the resignations which, according to its allegations, had been the subject of canvassing during working hours.

[46] In the second place, the Board will typically not consider resignations of members that are filed after an application for certification has been filed when deciding whether or not to order a representation vote. The Board considers membership cards the best evidence in deciding on the need for a representation vote. In *Canadian National Railway Company*, *supra*, the Board described its policy regarding "revocations of membership" by employees as follows:

> [30] Because of the requirement to sign membership cards as part of the certification process, it has been the Board's long-standing practice and policy to consider membership cards as the best evidence of employee wishes and exercise its discretion in ordering a vote in only the most compelling circumstances. This practice was reviewed in *Patterson Enterprises Ltd.* (1994), 93 di 154 (CLRB no. 1049).
>
> [31] The Board is not swayed by the filing of employee petitions, letters or revocations of membership in its decision whether to order a vote. Signatories of union membership cards bear the responsibility of their decision to join a union. Unless there are genuine reasons to disregard valid membership evidence, the Board is justified in relying on it (see *Canadian Broadcasting Corporation* (1993), 91 di 191 (CLRB no. 1007); and *Patterson Enterprises Ltd.*, *supra*).

[47] The other decided cases referred to by the majority merely confirm the Board's general policy of ordering a representation vote in cases of raids and other special circumstances.

[48] In fact, in *Télébec 1133*, *supra*, which was upheld on reconsideration in *Télébec 1148*, *supra*, the Board had before it multiple applications for certification filed following a transfer of constitutional jurisdiction from the provincial to the federal level. The Board determined that the matter was of an exceptional nature because of a number of factors, including the parties' labour relations history and the similarities between the matter in *Télébec 1133*, *supra*, and an application in a raid situation. In view of the circumstances, the Board redefined the bargaining unit structure and ordered a representation vote amongst all the bargaining agents that had filed an application for certification with the exception of one union that did not meet the minimum requirements set out in the *Code* in regard to a union's representative character.

[49] The matter in *Atomic Transportation System Inc.*, *supra*, involved reconsideration of an initial application for certification in which the applicant union had shown that it had the support of a majority of the employees in the bargaining unit by submitting a sufficient number of membership cards. For those reasons, the Board adhered to its policy not to order a representation vote to be held for a straightforward application for certification. It is useful to note that the decision in that matter was set aside by the Federal Court of Appeal in *Raeburn et al.* v. *Canada Labour Relations Board et al.* (1995), 184 N.R. 253 (F.C.A.), on the basis of a natural justice issue.

[50] Finally, in *Fastfrate 312*, *supra*, the Board had before it an application for certification filed by a council of trade unions pursuant to section 32 of the *Code*—an application that had to meet the usual criteria for a straightforward certification application. Part of the application was in the nature of a raid, which involved only a small portion of the bargaining unit. Given the special circumstances in that matter, the Board decided not to order a representation vote. It is important to note that the decision in that matter, as well as the decision of the reconsideration panel in *Fastfrate 333*, *supra*, were also set aside, but on the basis of an issue of constitutional jurisdiction (see *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters et al.*, no. 0401-13045, May 4, 2010 (Q.B.A.); and *Consolidated Fastfrate Inc.* v. *Western Canada*

Council of Teamsters and Consolidated Fastfrate Transport Employees' Association, A-483-05, February 25, 2010 (F.C.A.)).

[51] In the matter before us, the applicant union submitted membership cards for a majority of the employees in the bargaining unit. That evidence was challenged by the incumbent bargaining agent that, until proven otherwise, represents the majority of the employees in the unit. The fact that the applicant union produced resignations for a majority of the employees represented by the bargaining agent should not affect the evaluation of the evidence of membership and determination of the need to order a representation vote in a raid situation, given that one union is already certified. Given the evidence on file and the allegations made by the bargaining agent, I am of the view that the Board cannot definitively determine the wishes of the employees covered by the application without holding a representation vote.

[52] For all of the foregoing reasons, I would have ordered that a representation vote be held to determine the wishes of the employees covered by the application for certification filed in a raid situation in this matter and to enable the employees concerned to express their choice between the two competing unions.

Translation

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Member